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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

VS.

CEDRIC JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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STATEMENT OF THE QUESTION

I.

A search warrant permits a search anywhere within the named premises where the items named in the warrant to be seized might reasonably be found. When narcotics are specified, the pockets of people within the premises–especially given knock and announce requirements–are places within the premises where the contraband might be found. Have Michigan courts, as well as other courts, misapplied *Ybarra v Illinois*, concerning searching people in a place of public accommodation during the execution of a warrant for the premises, to the execution of a search warrant at a private dwelling?

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NOW COMES the State of Michigan, by **MICHAEL E. DUGGAN**, *Prosecuting Attorney for the County of Wayne*, and **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*,, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on September 10, 2002, leave denied by the Michigan Supreme Court on December 4, 2002.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> The right of the People to be secure in their persons, houses, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Detroit Police officer Ceiere Campbell was part of a team that obtained an executed a search warrant for narcotics at 8855 Heyden in the City of Detroit. The warrant also described a particular individual as a "place" to be searched. R, 5. A controlled buy had been made at the house, and the house had been investigated previously for narcotic activity. R, 6. The officer had been with the Narcotic Unit for four years, and been involved with at least 100 search warrant executions. R, 8.

When the warrant was executed there was four or five adults in the home, and some children. No person matching the description of the individual named in the warrant was present. R, 10. No drugs were found on the premises when the warrant was executed. R, 12.

Another officer, Ahmed Haidar, testified that he had been with the Narcotics Unit for 1 ½ years, and involved in raids on over 100 occasions. R, 14. He was assigned to "rear security" during the execution of the warrant. Those present inside the house were placed in a single room, and patted down for the safety of the officers executing the warrant. R, 15. The officer conducted a pat down of the defendant, looking for offensive weapons or contraband. R, 17. The officer "grabbed" defendants pocket and "rubbed them together" and could hear a sandwich baggie in the pocket; 95% of the time in his experience with drugs they had been packaged and stored in baggies. R, 17. He could tell the item was a baggie because he could "hear the plastic rubbing." R, 19.The officer removed the baggie. R, 19.

Counsel then argued the admissibility of the evidence. The trial court held that both the detention of the defendant and his frisk were proper, R, 49-50. 52; however, the court concluded that from the pat and the circumstances

surrounding its occurrence the officer did not have probable cause to believe what he felt was contraband, and thus the officer should not have removed the baggie from defendant's pocket. R, 53-55.

Petitioner appealed, arguing that the search of the person of the respondent was proper under the authority of the warrant, as his pockets were places within the premises were the contraband described in the warrant might reasonably be found, just as any other container that could contain the contraband. On September 10, 2002, the Michigan Court of Appeals affirmed, over the dissent of one judge. Leave to appeal was denied by the Michigan Supreme Court on December 4, 2002.

Reasons for Granting the Writ

Two Michigan cases hold that searching people present on premises being searched under warrant is not within the scope of the search authorized by the warrant, even if the items named in the warrant can be readily concealed on the person, and despite knock and announce requirements that render frustration of the warrant, if the persons of individuals cannot be searched under the warrant, painfully easy. Some other jurisdictions have reached the same conclusion, all relying erroneously on *Ybarra v Illinois*.[1] Because lower federal courts and state courts are misapplying this Court's decision in that case, and because this situation can occur with great frequency, plenary review is warranted.

In *People v Burbank*[2] the defendant, present on the premises where a search warrant for drugs was executed but not a resident of those premises, was observed with unusual bulges in her brassiere. A female officer then searched under the clothing, after taking Burbank into another room, and discovered vials of a controlled substance. Relying on *Ybarra,* the Michigan Court of Appeals held that the search could not be justified under the authority of the warrant, though *Ybarra* involved a search warrant for a place of public accommodation–a bar–and the search of patrons of the bar under the authority of a search warrant for the premises. So also in *People v Hawkins*,[3] where the Michigan Court of Appeals again relied on *Ybarra*, and so also in the present case. Because, then, the notion that search warrants for contraband that could be concealed on the person do not

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1. *Ybarra v Illinois*, 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979).

2. *People v Burbank*, 137 Mich App 266 (1985) .

3. *People v Hawkins*, 163 Mich App 196 (1987).

permit the search of the pockets of people present on the premises arises from *Ybarra*, and originally and fundamentally from *United States v Di Re*,[4] and because the legal landscape has changed with the decision of the Court in *Wyoming v Houghton*,[5] a close examination of these cases is in order.

The critical factual distinction in *Ybarra* from the instant case–that involved was a search of patrons of a place of public accommodation–should also lead to a distinction in the applicable rule of law. The search warrant in *Ybarra* authorized the search of the "Aurora Tap Tavern" and the person of an individual named "Greg" for controlled substances, money, instrumentalities, and paraphernalia used in the manufacture, processing, and distribution of controlled substances. Ybarra was simply a person present in the tavern when the warrant was executed, and was patted down when the warrant was executed, resulting in the discovery of contraband. The United States Supreme Court held that the search of Ybarra could not be justified under the warrant, which gave "no authority whatever to invade the constitutional protections possessed individually by the *tavern's customers*."[6] Thus, the case is distinguishable from the present case in important particulars:

- it involved a place of public accommodation, where the present case involves a private residence;

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4. *United States v Di Re*, 332 US 581, 68 S Ct 222, 92 L Ed 2d 210 (1948).

5. *Wyoming v Houghton*, 526 US 295, 119 S C 1297, 143 L Ed 2d 408 (1999).

6. 62 L Ed 2d at 246 (emphasis supplied).

- it involved the observation of narcotics only behind the bar; here, someone in the house had sold narcotics to an informant.

Di Re, the foundation of the view that a warrant for private premises does not authorize a search of people present on the premises, even where their pockets are places where the items named in the warrant might be concealed, is not a search warrant case at all. An officer was informed by one Reed that Reed was to buy counterfeit gasoline-ration coupons from one Battita. Battita was followed as he went to the appointed place. When officers approached the auto, Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was simply a passenger in the vehicle, and the officers had no information regarding him or the auto. Di Re was arrested and searched, and counterfeit coupons found on his person.

The Court held that the search of Di Re was not permissible, for simply because there was probable cause to believe that Battita possessed coupons gave no probable cause to search or arrest Di Re. The opinion, however, contains some unfortunate dicta. The government had *conceded* that a warranted search of premises would not justify a search of persons on the premises, and so the Court reasoned from this concession that an unwarranted search of an auto would not justify a search of all occupants. But the facts of Di Re demonstrate that there the officers only had reason to believe that Reed and Battita possessed coupons. To cite the case for the proposition that a private premises search under warrant will not allow a search of persons on the premises where the items named in the warrant might be found on the person is not justified.

This Court's recent case of *Houghton* is also critical to the analysis. Police stopped an auto for speeding, and saw a hypodermic syringe in the shirt pocket of the driver. When

the driver was asked why he had the syringe, he answered that he used it to take drugs. The passengers were ordered out of the vehicle as well, and the passenger compartment searched for drugs. In the back seat was a purse, which Houghton claimed was hers. The officer searched the purse; in it was a container, and in the container was a syringe and methamphetamine.

There was no contest on the question of whether the police had probable cause to search the car for illegal drugs; the question was whether that probable cause allowed the opening of the purse of a passenger of the vehicle, where the purse was in the vehicle. After a historical review of searches believed reasonable at the time of the ratification of the Constitution, the Court held that a probable-cause based search of a vehicle allows the search of every part of the vehicle and its contents that might conceal the object of the search. The Court concluded that where there is probable cause to search a car for contraband,

> it is reasonable for police officers...to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband *in* the car.[7]

To be sure, the Court distinguished *Di Re* and *Ybarra* as involving searches of the actual person of someone present on the premises, where *Houghton* involved a search only of a personal effect of someone that was left on the "premises," and who had no known connection to those premises. But the point–that probable cause should permit the search of any

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7. *Houghton*, at 302.

place where the items sought might reasonably be expected to be found–extends to the pockets of people on premises where a search warrant is executed for drugs, particularly in light of knock and announce requirements.

Though unable to persuade the Court in the context of a search of a place of public accommodation–where it is reasonable to expect that people come and go who would have no connection whatever to any illegal goings-on within the premises–Justice (now Chief Justice) Rehnquist's dissent in *Ybarra* is telling in the context of a search of *private* premises for contraband. A search warrant is an anticipatory authorization to search. Just as officers cannot foresee the existence of closets, cupboards, desks, nightstands, briefcases, and the like, neither can they always foresee the existence of persons with either an interest in the items to be seized or an interest in frustrating the warrant. Where the warrant clause has been satisfied and probable cause to search private premises determined by a neutral judicial officer, a search of reasonable intensity for the sought-after items is permitted. That search should include the pockets of persons on private premises where the items named in the warrant could be concealed on the person.

The existence of knock and announce requirements also demonstrate that searching people on premises where their pockets could contain the items named in the warrant is reasonable. Knocking and announcing is required by both statute[8] and the Constitution,[9] and is forgiven only if there is already a reasonable fear of frustration of the warrant, or

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8. MCL780.656.

9. *Wilson v Arkansas*, 514 US 927, 115 S Ct 1915, 131 L Ed 2d 976 (1995).

danger to the officers.[10] And officers executing the warrant must wait long enough for a person in the premises to reach the door from the room farthest away before entry may be forced.[11] Obviously, then, it would be a simple matter for a person present in the premises, on hearing the police knock and announce, to pick up the item named in the warrant put it in his or her pocket, where the item–such as cocaine–is easily concealed in a pocket. Surely the purpose of a warrant–a judicial command–should not be frustrated by such facile maneuvers.

Professor LaFave finds *Ybarra* to be an easy case precisely because "the premises were a public place then open for business," so that the police "did not have to give notice prior to entry."[12] Though LaFave is unwilling to say that a search of the persons of people on private premises is justified by the warrant itself where the items named in the warrant could be concealed on the person, LaFave does concede that "it is fair to see that such a case does necessitate a somewhat different assessment than was permissible on the acts of *Ybarra*." LaFave would find a search of the person permissible if the person lived at the place searched, was implicated in the warrant affidavit in the crimes under investigation, had engaged in suspicious or incriminating conduct during the execution of the warrant, or was found in immediate proximity to contraband in open view,[13] but

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10. *Richards v Wisconsin*, 520 US 385, 117 S Ct 1416, 137 L Ed 2d 615 (1997).

11. *People v Harvey*, 38 Mich App 39 (1972).

12. 2 LaFave, *Search and Seizure* § 4.9(c), p. 633. Again, the majority of the Michigan Court of Appeals here misses this point entirely.

13. LaFave, at 634.

essentially justifies these searches as based on probable cause under the circumstances, rather than simply authorized by the warrant.

Where there is not this sort of probable cause, LaFave asks whether the police are "powerless to take any steps at all to foreclose the risk that the person may depart the premises with critical evidence concealed on his person?"[14] His answer–that the police should be permitted to "order a person on premises to remain until the officer can be certain that the detainee is not engaged in removing the property specified in the warrant"[15]–but cannot obtain that certainty by searching the individual–is impractical. The police must go about the business commanded by the warrant–searching the premises–and detaining people for a time necessary to determine if they might leave with the items named in the warrant without providing the *only* method in most cases to *make* that determination–searching their person–makes no sense.

A search of reasonable intensity is allowed under a search warrant to discover the items named in the warrant. Where the items named are readily concealable on the person, that authority should be understood as including the persons of people present on the premises when the warrant is executed.

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14. LaFave, at 635.

15. LaFave, at 635.

CONCLUSION

Wherefore, the Petitioner requests that certiorari be granted..

Respectfully submitted,

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Appendix A: Court of Appeals Opinion

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Cedric JOHNSON, Defendant-Appellee.

No. 239886.

Sept. 10, 2002.

Before: MURRAY, P.J., and FITZGERALD and O'CONNELL, JJ.

[UNPUBLISHED]

PER CURIAM.

Defendant was charged with possession of less than twenty-five grams of heroin, M.C.L. § 333.7403(2)(a)(v). Defendant filed a motion to suppress evidence of the heroin found in his pocket when he was searched in a private home (not his own) while the police were executing a search warrant for the premises. After an evidentiary hearing, the trial court concluded that there was a lack of probable cause for the search of defendant's pocket, and therefore, suppressed the evidence. Because the prosecutor had no other evidence with which to proceed, the case was dismissed. The prosecutor appeals as of right, and we now affirm.

I. Facts And Procedural History

The evidence brought forward during the evidentiary hearing and the facts found by the circuit court are straightforward and undisputed. Defendant presented no evidence during the hearing while the prosecutor presented as witnesses Detroit police officers Ceiere Campbell and Ahmed Haidar. The only exhibit admitted into evidence was the November 14, 2001 search warrant and affidavit.

According to Officer Campbell, on November 12, 2001, the police conducted a controlled purchase of narcotics from 8855 Heyden in Detroit. The informant who made the purchase provided Campbell with a description of the person who sold him the drugs. The next day, Officer Campbell monitored the house and saw a person matching the description given by the informant, who opened the front door for a number of people during the surveillance period. Officer Campbell's description of these events was set forth in the search warrant affidavit as follows:

> On November 12, 2001 affiant met with SOI # 2012. The SOI was searched for drugs and money with negative results, was issued a sum of Secret Service Funds with which to make the purchase. The affiant observed the SOI go directly to the target locations front door, enter, stay briefly, then return directly to the affiant and turned over a quantity of suspected cocaine, and indicated that it was purchased from the above described seller at the above described place using the funds provided. The SOI was again searched for drugs and money with none found.
>
> The affiant conveyed the suspected cocaine to the Narcotics Section where a preliminary

analysis proved positive. The cocaine was then placed into LSF # 497947.

On November 13, 2001 affiant conducted surveillance of the target location. The affiant observed at least five unknown persons arrive both on foot and in vehicles within a thirty-minute period. The affiant would observe the individuals travel to the front porch, enter, stay briefly, then leave. The affiant believes this information coupled with the above facts is consistent with ongoing narcotic activity.

Based on the testimony contained in the search warrant affidavit, a search warrant was signed on November 14, 2001 authorizing the search of 8855 Heyden, and in particular the following items:

Also to be searched is the seller, described as a b/m/ approximately 40-45 years old, 6'0, 170lbs, medium build w/dark complexion and short black hair, referred to hereafter as seller, and to seize, tabulate and make return according to the law the following property and things; all controlled substances, all moneys, books and records used in connection with illegal narcotic trafficking, all equipment and supplies used in the manufacture, delivery, use or sale of controlled substances, all firearms used in connection with the above described activities, all evidence of ownership, occupancy, possession or control of the premises.

Both officers Campbell and Haidar participated in one form or another with the subsequent execution of the search warrant. Officer Haidar's assignment was to provide security

toward the rear of the dwelling while the raid was initiated. Once the premises had been secured, Officer Haidar entered the dwelling. Officer Haidar found four adults who were already located in the living room, while Officer Campbell testified to also seeing "some children" in the house. Officer Haidar testified that he decided to conduct pat down searches for weapons on the adults for safety purposes and for the purpose of locating evidence of contraband. [FN1] With respect to defendant, Officer Haidar conducted a pat down search and, while doing so, grabbed defendant's right front pocket and rubbed it together, which produced the sound of a plastic baggie rubbing together. As he removed the baggie from defendant's pocket, another item fell out. The other item was another baggie containing loose marijuana. Officer Haidar's testimony as to this event was as follows:

> FN1. The testimony established that the pat down search conducted by Officer Haidar took place after the officers had already conducted a sweep of the house to locate other potential inhabitants.

(By Mr. Bresnehan)
Q. When you were conducting your search on the outside part of the clothing, correct?
A. Yes.
Q. You indicated that. You indicated you felt something, correct?
A. Correct.
Q. And based on your experience as a police officer you felt it was packaging. What made you conclude that?
A. When I removed it from his pocket.
Q. Okay, what made you initially suspect it could have been contraband or any type of evidence?
A. Because it was a sandwich baggie, and from my past experience ninety percent of the time narcotics would be stored in a sandwich baggie.

Q. Okay, was there something about the material that made you believe it was a baggie when you felt it?
A. It was the plastic. When I rubbed it together I felt, I could hear the plastic rubbing.
Q. Okay, and at this time you felt that you -it was a baggie and you took it out of the defendant's pocket, correct?
A. Yes.
Q. And what did you then do with it?
A. I took the baggie out of his pocket and another item fell out of his pocket, along with the baggie that I obtained in my hand had loose marijuana in it.
Q. Okay, and that fell out as you were pulling out the first baggie?
A. Yes.

The undisputed evidence also established that there were no other narcotics found during the search of the home and neither defendant nor any of the other persons present in the home ever made any motion, gesture, or any other type of act that caused Officer Haidar to believe that defendant was dangerous or associated with any criminal activity in the house. Defendant was subsequently arrested.

After a suppression hearing, the trial court granted defendant's motion, holding that although the officer had the authority to conduct a pat down search of defendant, the officer's pat down of defendant did not provide him with probable cause to believe defendant had contraband in his pocket. See *Terry v. Ohio*, 392 U.S. 1; 88 S Ct 1868; 20 L.Ed.2d 889 (1968).

The prosecutor now concedes on appeal that the evidence was not properly seized under the plain feel exception to the warrant requirement, and thus does not challenge the trial court's decision in that regard.

The prosecutor, however, now defends the search of defendant on the ground that this Court should adopt a bright line rule under which the scope of the search warrant for narcotics in a private residence would allow the search of anyone found on the premises. [FN2] Because this argument was not properly presented to nor decided by the trial court, the issue is not preserved. See *People v. Grant,* 445 Mich. 535, 546; 520 NW2d 123 (1994). This Court's review of an unpreserved issue is limited to determining whether the prosecutor demonstrated a plain error affecting substantial rights. *People v. Carines,* 460 Mich. 750, 763-764; 597 NW2d 130 (1999). This Court reviews constitutional questions de novo. *People v. Pitts,* 222 Mich.App 260, 263; 564 NW2d 93 (1997).

> FN2. During closing arguments in the trial court, the prosecutor did make minimal reference to the argument that searching the individuals found in the house was permissible pursuant to the search warrant. However, the trial court did not decide that issue, most likely because the main thrust

of the prosecutor's argument was that the plain feel exception authorized the search and seizure. The lower court record does not contain a written response to defendant's motion, so we are unable to discern what, if anything, the prosecutor argued in writing to the trial court.

A. *People v. Hawkins; People v. Burbank*

In support of his assertion that the scope of a search warrant for narcotics in a private residence should automatically justify the search of all persons found on the premises, without regard to probable cause or reasonableness requirements, the prosecutor argues that the United States Supreme Court decision in *Wyoming v. Houghton,* 526 U.S. 295; 119 S Ct 1297; 143 L.Ed.2d 408 (1999), changed the landscape of search and seizure law. The prosecutor asserts that *Houghton* extended the scope of a search warrant to the pockets of persons found on the premises because, as the prosecutor contends, when drugs are concerned, persons' pockets constitute "any place where the items sought might reasonably be expected to be found." The prosecutor argues that, in light of *Houghton,* this Court should reexamine its decisions in *People v. Hawkins,* 163 Mich.App 196; 413 NW2d 704 (1987), and *People v. Burbank,* 137 Mich.App 266; 358 NW2d 348 (1984).

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v. Kazmierczak,* 461 Mich. 411, 417; 605 NW2d 667 (2000). Absent a compelling reason to impose a different interpretation, the Michigan Constitution is construed to provide the same protection as that secured by the Fourth Amendment. *People v. Levine,* 461 Mich. 172, 178; 600 NW2d 622 (1999). Generally, a search or seizure conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v. Borchard-Ruhland,* 460 Mich. 278, 294; 597 NW2d 1 (1999). Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been or is being committed and that the evidence sought will be found in a stated place. *People v. Beuschlein,* 245 Mich.App 744, 749; 630 NW2d 921 (2001). Whether probable cause exists

depends on the information known to the officers at the time of the search. *Id.* at 750.

In *Burbank, supra,* the defendant was found, along with several other adults and children, in a home that was being searched. All were placed with their hands up against a wall. One of the officers on the scene observed "bulges" in the defendant's brassiere. Although the defendant was not one of the persons listed in the search warrant to be searched, the officer took the defendant into another room to be searched. Three vials of amphetamine were found. The trial court suppressed the evidence, and this Court affirmed, holding that the officer did not have probable cause to search the defendant when the defendant was not a resident of the house, and the police officer did not have any facts upon which to assert probable cause to search her brassiere. *Burbank, supra* at 269-270. The Court rejected the prosecutor's argument that the defendant was properly searched because the defendant was found in a home in which narcotics were found on other persons. *Id.* at 270.

The basis for the *Burbank* Court's holding was *Ybarra v. Illinois,* 444 U.S. 85; 100 S Ct 338; 62 L.Ed.2d 238 (1979). In *Ybarra,* a search warrant was issued authorizing the search of the Aurora Tap Tavern and its bartender for any evidence pertaining to the possession of a controlled substance. *Ybarra, supra* at 88. That same day police officers executed the search warrant. One officer conducted pat down searches of the nine to thirteen customers present, including the defendant, as a "cursory search for weapons." *Id.* When patting down the defendant, the officer felt a cigarette pack that he thought contained "objects." *Id.* After patting down the remaining customers, the officer returned to the defendant, removed the cigarette pack, and found in it six tin foil packets of heroin. *Id.* at 89.

The defendant filed a motion to suppress, which was denied

by the trial court. The Illinois Court of Appeals affirmed, and the Illinois Supreme Court denied leave to appeal. The United States Supreme Court reversed, holding that the defendant's Fourth Amendment right against unreasonable searches was violated. *Id.* at 96.

The Court's holding was based on two principles. First, the Court held that probable cause is not provided by the singular fact that the person is located in a dwelling in which there is judicially determined probable cause to believe that illegal activity is taking place:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, *a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v New York,* 392 U.S. 40, 62-63, 88 S Ct 1889, 1902, 20 L.Ed.2d 917. Where the standard is probable cause, a search or seizure *of a person* must be supported by probable cause particularized with respect to that *person.* This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" *of persons,* not places. [*Id.* at 91 (footnote omitted; emphasis added).]

The *Ybarra* Court also held that the search of the defendant could not be justified under *Terry* because the *Terry*

exception "does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on the premises where an authorized narcotics search is taking place." *Id.* at 94.

Returning to our State court decisions, several years following *Burbank,* we decided *Hawkins, supra.* In that case the defendant was given a pat down search when he was found in a house during the execution of a search warrant. Upon performing a *Terry* pat down search, the police found two vials of Percodon on the defendant. The defendant was arrested, but the case was ultimately dismissed when the trial court suppressed evidence of the Percodon. *Hawkins, supra* at 197. This Court affirmed the trial court, holding that under *Ybarra* and *Burbank,* the officers could not search the defendant on the sole basis that he was in a house that was the subject of a valid warrant:

We disagree with the prosecutor's argument that the search of defendant's person was authorized by the warrant. In *Ybarra v. Illinois,* 444 U.S. 85, 91; 100 S Ct 338; 62 L.Ed.2d 238 (1979), the Supreme Court noted that persons have a constitutional right guaranteed by the Fourth and Fourteenth Amendments to the reasonable expectation of personal privacy. When a search warrant is executed and persons not named in the warrant are searched on the basis that their presence on the premises made them "containers of the evidence," that constitutional right is eroded. *Ybarra, supra; People v. Arteberry,* 154 Mich.App 1, 4; 397 NW2d 198 (1986), lv gtd 428 Mich. 857 (1987); *People v. Burbank,* 137 Mich.App 266; 358 NW2d 348 (1984), lv den 419 Mich. 917 (1984), cert den 469 U.S. 1190, 105 S Ct 962; 83 L.Ed.2d 967 (1985).

In the instant case, defendant did not live in the house that the police were searching, nor did the police have probable cause

to search defendant.–Because it was not apparent that defendant possessed illegal contraband, the police could not arrest defendant or extend the warrant to search him. *People v. Secrest,* 413 Mich. 521, 528; 321 NW2d 368 (1982); *Burbank, supra.* [*Id.* at 197-198.]

B. *Wyoming v. Houghton*

Houghton is a case that dealt with the automobile exception to a warrantless search of the contents of an automobile. The issue in that case was whether "police officers violate the Fourth Amendment when they search a passenger's *personal belongings* inside an automobile that they have probable cause to believe contains contraband." *Houghton, supra* at 297 (emphasis added). That case did not involve the search of the purse's owner or the search of a person's pockets. The difference between searching a person, as opposed to a container, is significant. Indeed, the *Houghton* Court repeatedly emphasized the constitutional distinction between the two searches.

In holding that all containers found within an automobile are the proper subject of a search when there is probable cause to believe that the automobile itself contains contraband, the *Houghton* Court emphasized that it's holding was entirely consistent with *Ybarra* and the earlier decision of *United States v. Di Re,* 332 U.S. 581; 68 S Ct 222; 92 L.Ed.2d 210 (1948). The Court, speaking through Justice Scalia, noted that *Ybarra* and *Di Re* "turned on the unique, significantly heightened protection afforded against searches of one's person," *Houghton, supra* at 303, and, citing *Terry, supra* at 24-25, the Court explained why the search of a person, as opposed to an object, is granted this "heightened protection:" " 'Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." ' *Houghton, supra.* Thus, because "[s]uch traumatic consequences are not to be

expected when police examine an item of personal property found in a car," the Court held that the Wyoming Supreme Court had erred in relying upon *Di Re* and *Ybarra* because those cases involved searches of persons, rather than containers as in *Houghton. Id.* at 303 and n 1. See also *id.* at 308 (Breyer, J., concurring). Hence, in reviewing *Houghton,* it is abundantly clear that the Court specifically distinguished between the law governing searches of persons as dealt with in *Di Re* and *Ybarra,* and the search of objects belonging to persons as addressed in *Houghton.*

In light of the foregoing principles, it is apparent that the holdings of this Court in *Burbank* and *Hawkins* remain good law after *Houghton.* As discussed, *Houghton* did not deal with the search of a person, but dealt with the substantially different issue of searching an object of personal property not found on the person, but in a car. Hence, the prosecutor has failed to convince us that *Houghton* has at all changed the legal landscape with respect to the search of *persons* under the Fourteenth Amendment. [FN3]

> FN3. We point out that other than *Houghton,* the prosecution has not provided this Court with any authority in support of its position. We would expect that in asking this Court to reverse two of our precedents, the prosecution could offer at least one case that holds that all occupants in a private dwelling are subject to a search based on the existence of a warrant to search the premises for narcotics and devices used with same.

We also emphasize what this case is *not* about. Neither the facts in this case nor the arguments presented raise the line of cases which distinguish *Ybarra* on the basis that the occupant searched was determined not to be a "mere visitor" in a private home that was the subject of a search warrant. Those

cases, which emanate from both the state and federal courts, have held on a variety of grounds that occupants who are found, for example, in a house containing narcotics in the open for all to view, are not in a position similar to a random customer in a public tavern. See, e.g., *United States v. Gray,* 814 F.2d 49, 51-52 (CA 1, 1987) (upholding a search of the defendant's jacket, which he was not wearing, even though he was a visitor not named in the search warrant because it was 3:30 a.m. and a drug deal had just "gone down"); *United States v. Holder,* 990 F.2d 1327, 1329 (CA DC, 1993) (the defendant's proximity to large amounts of narcotics on open display gave probable cause to search the defendant); *United States v. Savides,* 664 F Supp 1544, 1550-1552 (ND Ill, 1987) (the defendant's presence in the home with large quantities of narcotics and weapons in plain view granted police probable cause to search the defendant, even though he was a visitor in a private home); *State v. Andrews,* 201 Wis 2d 383; 549 NW2d 210 (1996) (distinguishing between searches of a person and the search of a visitor's "belongings"); *State v. Leiper,* 145 NH 233; 761 A.2d 458 (2000). [FN4]

FN4. For a discussion of these cases and the differing principles espoused with respect to the search of a visitor's personal belongings when located in a private home subject to a search warrant, see *Propriety of Search of Nonoccupant Visitor's Belongings Pursuant To Warrant Issued For Another's Premises,* 51 ALR 5th 375 (1997) and *People, Places and Fourth Amendment Protection: The Application of Ybarra v Illinois To Searches of People Present During The Execution Of Search Warrants On Private Premises,* 25 Loy U Chi LJ 243 (1994).

The dissenting opinion overstates our holding in this case. We, in no fashion, hold that there is an "absolute bar" to the

search of persons located on private premises subject to a search warrant. Rather, we simply hold that (1) *absent probable cause* to search individuals not named in the search warrant and who do not own or reside in the premises, they cannot be searched without offending the Fourth Amendment (assuming, also, of course, that no other exception to a warrantless search exists), and (2) *Houghton* does not stand for the proposition that all *persons* found within a dwelling can be searched as potential containers of evidence (again, absent probable cause to do so). These are hardly remarkable conclusions given that the *Houghton* Court specifically distinguished *Ybarra* and *Di Re* from the case before it, and the failure of the prosecution to cite a single case which is contrary to our holding today. Finally, although we too find Justice Rehnquist's dissent reasonable and well- founded, "[a] dissenting opinion obviously does not constitute binding precedent." *US v. Jackson,* 240 F3d 1245, 1249 (CA 10, 2001). Our obligation is to follow the Supreme Court's binding opinions interpreting the Fourth Amendment, and as a lower court, we cannot alter these precedent. That task is to be taken, if at all, by the Supreme Court. *Rodriquez De Quijas v Shearson/American Express Inc,* 490 U.S. 477, 484; 109 S Ct 1917, 1921; 104 L.Ed.2d 526 (1989).

Accordingly, because the prosecution concedes the propriety of the trial court's ruling as to the invalidity of the search under *Terry,* and no other probable cause has been suggested to exist that would have warranted the search of defendant, we affirm the trial court's order.
Affirmed.

O'CONNELL, J. (dissenting).

OCONNELL, J.

I respectfully dissent. In this case, the police obtained a valid search warrant to search the premises at 8855 Hayden. While executing the search warrant, defendant, an occupant of the

premises, was searched by Officer Haidar. Officer Haidar located heroin in the defendant's pocket.

Following previous Michigan cases, the majority concludes that it is unlawful to search persons on the premises who are not named in the search warrant. This previous precedent appears to set an absolute bar to searching persons located on the premises, but not named in a search warrant. Unfortunately, this bar allows persons not named in a search warrant to frustrate the search simply by placing the contraband in their pocket. In my opinion, this absolute bar leads to an absurd result. [FN1]

FN1. The majority concludes that, "Absent probable cause to search individuals not named in the search warrant and who do not own or reside in the premises, they cannot be searched without offending the Fourth

Amendment ... "I note that in most instances, once the police obtain a search warrant, they have probable cause to search all containers on the premises that may contain drugs. The police are not required to obtain further probable cause to search these containers. Stated another way, once the police obtain a search warrant, the police may search within the scope of the search warrant without obtaining additional probable cause.

The majority concludes that prior case law limits the scope of a search warrant. This limitation, in my opinion, is unreasonable. The distinction is between visitors on the premises and containers on the premises. The majority, following prior precedent, concludes the search warrant does not provide probable cause to search visitors. If a container, such

> as a coat, is located on a guest of the premises, the majority concludes that the police cannot search the coat. However, under present case law, if that same coat is located on a bar stool in the kitchen, the search warrant authorizes the police to search the coat. If the police have obtained a valid search warrant supported by probable cause, the scope and intensity of the probable cause that supports the search warrant should allow the police officers to search all containers located on the premises where drugs may be hidden.

I conclude that Officer Haidar, acting under the authority of a valid search warrant, did not exceed the scope of the warrant in locating and retrieving the heroin hidden in defendant's pocket. The test to determine if a search warrant violates the Fourth Amendment is one of reasonableness. See *United States v. Knights,* 534 U.S. 112, ___; 122 S Ct 587, 588; 151 L.Ed.2d 497, ___ (2001), on remand 278 F3d 920 (CA 9, 2002). Extracting heroin from defendant's pocket at a known drug house while executing a search warrant does not violate my sense of reasonableness.

For the reasons stated in Justice Rehnquist's dissent in *Ybarra v. Illinois,* 444 U.S. 85; 100 S Ct 338; 62 L.Ed.2d 238 (1979), I would reverse the decision of the trial court.

Appendix B: Order Denying Leave

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Cedric JOHNSON, Defendant-Appellee.

SC: 122365

COA: 239886

Wayne CC: 01-013859

On order of the Court, the application for leave to appeal from the September 10, 2002, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 4, 2002 SS

FILED
MAR 20 2003

No. 02-1076

In the

Supreme Court of the United States

MICHIGAN,

Petitioner,

v.

CEDRIC JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE QUESTION

Respondent accepts that the Petitioner fairly states the question involved.

OPINIONS BELOW

Respondent accepts Petitioner's statement concerning the opinions below.

STATEMENT OF JURSIDICTION

Respondent accepts Petitioner's statement concerning this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS

Respondent accepts Petitioner's statement concerning the constitutional provisions involved.

OBJECTIONS TO PETITIONER'S STATEMENT OF FACTS

Respondent takes exception to Petitioner's representation that the search warrant for 885 Heyden, Detroit described a particular individual as a "place" to be searched. As the warrant itself demonstrates, it would be more accurate to characterize the "seller" as a "person," not a "place," to be searched.[1]

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[1] The search warrant appears herein as Appendix A

This is not a trivial matter of mere semantics. While the warrant authorizes the search of a particular place based upon probable cause to believe that illegal activity had occurred there and that illegal drugs were present, it further relies on a "particularized probable cause" to believe that a specific person would be in possession of contraband. The warrant does not authorize the search of the person simply because he would be located at the premises where the search was to occur. Rather, it relies on probable cause to believe that this particular person would be in possession of drugs.

Here the "seller" is not simply a "place" within the premises, but a "person" who was reasonably believed to be in possession of contraband. On its face, the search warrant recognizes the unique and heightened protection afforded to a "person."

In all other aspects, Respondent accepts Petitioner's statement of material facts and proceedings.

REASONS FOR DENYING THE WRIT

In *Ybarra v Illinois*,[2] this Honorable Court held that a warrant authorizing the search of a public tavern and its employee bartender did not provide a basis for the search of a patron who happened to be on the premises at the time the warrant was executed. In doing so, this Court recognized that the unique and significantly heightened protection afforded against searches of one's person prohibits the search of an individual without a "particularized probable cause" to believe that the

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[2] 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979)

individual is engaged in criminal activity or in possession of contraband. As stated therein:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron v New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See *Rakas v Illinois*, 439 U.S. 128, 138-143, 148-149, 99 S.Ct. 421, 427-430, 433, 58 L.Ed.2d 387; *Katz v United States*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511, 19 L.Ed.2d 576.
>
> Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and

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> Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued on probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.[3]

Even though it may legitimately be argued that changes in the "legal landscape" occurring since *Ybarra* have given the police greater powers to conduct searches, this Court has consistently recognized the importance of the constitutional right to personal privacy upon which that case was decided. In *Wyoming v Houghton*,[4] the requirement of a "particularized probable cause" to search a person was clearly and unequivocally reaffirmed.

There this Court held that when probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This Court determined that this rule applies to all containers within a car, without qualification as to ownership and without a showing of individualized probable cause for each container.

However, this Court therein clearly recognized that this right to search "containers" capable of concealing the object of the search does not extend to a search of the

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[3] Ybarra, 444 US at 91-92

[4] 526 US 295, 119 S Ct 1297, 143 L Ed 2d 408 (1999)

persons who merely occupy the vehicle, without an individualized probable cause. This Court expressly stated:

> In this regard–the degree of intrusiveness upon personal privacy and indeed even personal dignity–the two cases the Wyoming Supreme Court found dispositive differ substantially from the package search at issue here. *United States v Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. **These cases turned on the unique, significantly heightened protection afforded against searches of one's person.** "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car.[5]

Recognizing that Ybarra turned on the unique

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[5] Houghton, 526 US at 303 (Emphasis Added)

constitutional protection afforded to a "person," Michigan appellate courts have consistently held that its rationale is equally applicable whether the place to be searched under the warrant was a public accommodation or a private residence.[6] As noted by the Michigan Court of Appeals:

> The prosecutor further argues that *Ybarra* is distinguishable since in the instant case defendant was visiting a private residence, not a public place such as a tavern. We are unable to make such a distinction. Defendant could legitimately expect as much privacy, if not more, when visiting her friends than while being a patron in a public place.[7]

This view recognizes that a person who is merely a visitor at a particular premises has a different expectation of privacy than the owner or residents of that premises. This applies equally, whether the premises is a business open to the public or a private residence. It is a fundamental principle of constitutional law that the Fourth Amendment protects persons, not places. To treat a person who is on any premises at the time a search warrant is issued as simply a container where the contraband may be located is an infringement on the visitor's constitutional right to personal privacy, and goes beyond the justifiable intrusion on the privacy of the owner or resident which is authorized by the warrant. As

---

[6] e.g., People v Burbank, 137 Mich App 266, 358 NW 2d 348 (1984); People v Arteberry, 154 Mich App 1, 397 NW 2d 198 (1986), rvd othr grds, 431 Mich 381, 429 NW 2d 574 (1988); People v Hawkins, 163 Mich App 196, 413 NW 2d 704 (1987).

[7] Burbank, 137 Mich App at 271

noted below:

> We disagree with the prosecutor's argument that the search of defendant's person was authorized by the search warrant. In *Ybarra v Illinois*, 444 U.S. 85, 91; 100 S Ct 338; 62 L.Ed.2d 238 (1979), the Supreme Court noted that persons have a constitutional right guaranteed by the Fourth and Fourteenth Amendments to the reasonable expectation of personal privacy. When a search warrant is executed and persons not named in the warrant are searched on the basis of their presence on the premises made them "containers of the evidence." that constitutional right is eroded. *Ybarra*, supra; *People v Arteberry*, 154 Mich App 1, 4; 397 NW2d 198 (1986), lv gtd 428 Mich 857 (1987); *People v Burbank*, 137 Mich App 266; 358 NW2d 348 (1984), lv den 419 Mich 917 (1984), cert den 469 U.S. 1190, 105 S Ct 962; 83 L.Ed.2d 967 (1985).[8]

Petitioner argues that this Court should grant the writ because Michigan and other jurisdictions have misapplied *Ybarra* as controlling when a search warrant is executed at a private residence. In support of his position, Petitioner points out that constitutional and statutory "no-knock" requirements applicable to private residences delay entry into the premises, and permit any person on the premises to frustrate the purpose of the search warrant by simply hiding contraband on his or her person.

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[8] Petition For Writ of Certiorari To The Michigan Court Of Appeals, p. 10A

He seeks a bright-line rule that a search warrant authorizing a search of a particular private residence in and of itself permits the search of every person located on the premises as simply a "container" where contraband might be found.

But this argument simply fails to recognize that *Ybarra* turned not on the nature of the location where the search occurred, but rather on the unique and heightened constitutional protection afforded each person under the Fourth Amendment. Whether at a tavern open to the public, or in a private residence, a "person" should be subject to search only when there is a "particularized probable cause" to believe that individual is engaging in criminal activity or is in possession of contraband. As Michigan courts clearly and appropriately recognize, to hold otherwise would result in an erosion of that individual's constitutional rights.

CONCLUSION

For the reasons herein stated and discussed, Respondent requests that certiorari be denied.

Respectfully Submitted

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Attorney for Respondent

STATE OF MICHIGAN SS SEARCH WARRANT
COUNTY OF WAYNE AND AFFIDAVIT

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY: CEIERE CAMPBELL
Affiant having subscribed and sworn to an Affidavit for Search Warrant, and having under oath examined the affiant, am satisfied that probable cause exists:

THEREFORE IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING PLACE:
The entire premises and curtilage of 8855 Heyden, which is described as a 1 ½ story, single family, light colored sided dwelling, located on the west side of the street between Joy Rd. and Dover, referred to hereafter as the target location, located in the City of Detroit, County of Wayne and the State of Michigan. Also to be searched is the seller, described as a b/m/ approximately 40-45 years old, 6'0, 1 70lbs, medium build w/dark complexion and short black hair, referred to hereafter as the seller, and to seize, tabulate and make return according to the law the following property and things; all controlled substances, all moneys, books and records used in connection with illegal narcotic trafficking, all equipment and supplies used in the manufacture, delivery, use or sale of controlled substances, all firearms used in connection with the above described activities, all evidence of ownership, occupancy, possession or control of the premises.

THE FOLLOWING FACTS ARE SWORN TO BY THE AFFIANT IN SUPPORT OF THE ISSUANCE OF THIS WARRANT.
1). The affiant is a sworn member of the Detroit Police Department Narcotics Division and was assigned to investigate a complaint of narcotic activity at the

above location. On 11-12-01 affiant met with a credible and reliable SOI#20 12 regarding the sale of narcotics from the above described place. Information from this SOI has been used on over 10 occasions by the affiant and other members of the Narcotics Division resulting in over 8 arrests for VCSA and other offenses, with over 8 convictions in Recorders Court and 36th District Court.

2). On 11-12-01 affiant met with SOI#2012. The SOI was searched for drugs and money with negative results, was issued a sum of Secret Service Funds with which to make the purchase. The affiant observed the SOI go directly to the target locations front door, enter, stay briefly, then return directly to the affiant and turned over a quantity of suspected cocaine, and indicated that it was purchased from the above described seller at the above described place using the funds provided. The SOI was again searched for drugs and money with none found.

3). The affiant conveyed the suspected cocaine to the Narcotics Section where a preliminary analysis proved positive. The cocaine was then placed into LSF#497947.

4), On 11-13-01 affiant conducted surveillance of the target location. The affiant observed at least 5 unknown persons arrive both on foot and in vehicles within a 30 minute period The affiant would observe the individuals travel to the front porch, enter, stay briefly, then leave. The affiant believes this information coupled with the above facts is consistent with ongoing narcotic activity.

5). The affiant has participated in over 50 narcotic raids in the City of Detroit. In the overwhelming majority of these raids illegal firearms were found used to protect the illegal narcotic trade.

6). Wherefore the affiant has probable cause to believe that the above described seller and items will be found on the above described premises.

A SEARCH WARRANT RETURN MUST BE FILED WITH THE PROSECUTOR'S OFFICE FOR EVERY SEARCH WARRANT WHICH IS APPROVED.

SUBSCRIBED AND SWORN TO BEFORE ME AND ISSUED UNDER MY HAND THIS 14th DAY OF NOVEMBER 2001

/s/
AFFIANT

/s/
APPROVED
ASSISTANT PROSECUTING ATTORNEY

/s/
JUDGE/MAGISTRATE OF THE 36th
DISTRICT COURT WAYNE
COUNTY MICHIGAN